BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

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Date: August 19, 1998
Case No: 98-INA-00010

In the Matter of:

TACO GRILL
Employer

On Behalf of:
JUAN PEREZ
Alien

Appearance: Dan E. Korenberg, Esq.
for the Employer and the Alien

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Juan Perez ("Alien") filed by Employer Taco Grill("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis

must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On August 11, 1995, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Cook Mexican Specialty Food in employer's Mexican Restaurant.

The duties of the job offered were described as follows:

"Cook season and prepare all mexican dishes in menu. Cut, wash, chop vegetables. Cut, trim, bone meats, poultry and fish. Season and prepare soups, rice, beans, etc. prepare burritos, tacos, enchiladas, quesadillas, etc. Order/requisition supplies. Estimate consumption. Garnish portions upon patron's order. Season & prepare southwestern style fajitas, blue corn tortillas and green corn tamales. Cook will supervise the activities of a cook helper. The helper will assit the cook in the preparation of the dishes. He/she peels, washes and cuts the vegetables, warm tortillas, grinds spices and corn meal, slices meats and make batter for tamales." (Unedited)

No education, and 2 years experience was required in the described job or the related occupation of Cook/helper/Mexican Specialty Food (Southwestern). Special requirements were: Experience must include preparation of southwestern mexican cuisine. Work schedule is Wed. Thru Sun. Wages were $8.00 per hour. Supervise 1 employee and report to owner. (AF-61-99)

On July 16, 1996, the CO issued an amended NOF proposing to deny certification. This NOF incorporated an NOF of April 19, 1996, finding that Employer's application was deficient on several grounds. Employer had failed to document alien's prior experience met the job requirements or of 2 years experience as a cook helper/mexican food; that there was an inconsistent work history for alien, i.e. the employer was not in business according to EDD records until the third quarter of 1992; the wages reported for the alien do not equal the rate of pay on the 750 Part A for full time employment. In the July 16, NOF, the CO found that the copies of W-2s submitted for years of 1991, 1993, 1994 and 1995 demonstrated that in the years 1994 and 1995, based on a 40 hour week, it appears the alien was paid $3.31 per hour in 1994 and $3.45 per hour in 1995. "Based on the documentation submitted, it does not appear that the position is in fact full time, nor that the employer has paid the prevailing rate."(AF-23-

60)

Employer, September 4, 1996, forwarded its rebuttal, stating its disagreement with the CO's decision in the amended NOF, noting initially citations to the Sections or subsections of the regulations are required but not given by the CO. With respect to wages, Employer contends that it has the ability to pay the prevailing wage rate, and that it is irrelevant what Employer previously paid alien. In that connection, however, Employer submitted an affidavit that he has employed alien since September, 1990 and currently pays him $6.25 per hour. Due to numerous leaves of absence and family emergencies his total wages for 1994 and 1995 only amounted to $6,876. and $7,182. A gross receipts tax return showing $202,949 gross sales in 1994 was submitted. (AF-28-58)

On November 6, 1996, the CO issued a Final Determination denying certification. The CO found Employer had not demonstrated an ability to pay the wages for the job opportunity and/or that the job opportunity was not fulltime. She stated: "The alien's W-2 forms for the tax year of 1994 shows the total wages of $6876.00 and $7182.00 for the tax year of 1995, respectively. This information is inconsistent with the counsel's statement as cited above. If in fact, the alien is earning $6.25 per hour for 40 hours per week, the total wages for the tax years of 1994 and 1995 should be $13,000 per year. ($6.25 x 40hrs=$250 wk x 52 wks=$13,000 yr)" The CO stated with respect to the issue of documentation of job being full-time and whether Employer is capable of paying: "Granted, the employer's 1994 income tax statement shows wages in excess of $200,000.00, but the overwhelming proof of the W-2s paid to the alien appear to reflect the truer picture of employer's ability/and or willingness to pay for a full-time position."(AF-59-60)

On February 13, 1997, Employer filed a request for review and reconsideration of Final Determination. (AF-2-9)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993). On the other hand, where the Final Determination does not respond to Employer's argument or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not in issue before the Board. Hunter's Inn, 95-INA-278(Feb. 19, 1997); Barbara Harris, 88-INA-32(April 5, 1989)

Where the CO requests documents, they must be produced if it has a direct bearing on the issue and is obtainable by reasonable

efforts. Written assertions which are reasonable and indicate their sources or bases shall be considered documentation which then must be given the weight they rationally deserve in making the relevant determination. Gencorp., 87-INA-659 (Jan. 13, 1988)(en banc).

As a preliminary matter, we agree with Employer that citation to the regulations concerning alleged violations is required of the CO. Such citations are particularly relevant where the alleged violation has been vaguely worded or may contain one or more issues. The NOF must give notice which is adequate to provide the employer an opportunity to rebut or cure the alleged defects. Downey Orthopedic Medical Group, 87-INA-674 (Mar. 16, 1988)(en banc). The NOF must state with specificity how the employer allegedly violated a section or subsection of the regulations. Flemah, Inc., 88-INA-62(Feb. 21, 1989)(en banc).

We find that the CO is incorrect in making a speculative finding that Employer, despite 1994 gross sales of $200,000+ is unable to pay alien the prevailing wage. Clearly, such sales would indicate that Employer is capable of paying. See, Foothill Division Karate Club, 93-INA-494 (Oct. 11, 1994). The CO's further speculation that based on W-2 forms, Employer is unwilling to pay alien the prevailing wages, while in certain circumstances may prove bad faith, is irrelevant to the issue of full-time employment. Moreover, failure to pay the wage at the time application is sought, is not a basis for denial. The Kroenke Group, 90-INA-318 (July 12, 1991) On the other hand, the wage statements and arguments of employer with respect to the work history of alien are not totally persuasive, and leave some doubt as to both the time of experience of alien in the former job as cook helper and as to the full-time nature of the job offer.

In the cases of Francis Kellogg,94-INA-465; The Winner's Circle, 94-INA-544; and North Central Organized Regionally for Total Health, 95-INA-68, decided jointly, en banc on February 2, 1998, the Board stated: "Permitting an employer to advertise with qualifications greater than that possessed by the alien, but allowing the alien to qualify with lesser qualifications which are listed in the guise of "alternate" qualifications, is a violation of 656.21(b)(5). Thus we hold that any job requirements, including alternative requirements, listed by an employer on the ETA Form 750A must be read together as the employer's stated minimum requirements which, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States, shall be those defined for the job in the D.O.T.,..Therefore we also hold that the "permissive alternative" job requirement analysis in *Best Luggage* is not in compliance with the regulations, and is overruled." (Pp. 6)

Thus the record brings forth a *prima facie* apparent violation of 656.21(a)(5) not directly cited by the CO, perhaps because of

the then standard established in Best Luggage which has subsequently been specifically overruled by the Board. We further note the Board's analysis: "In *Kellogg*, the primary requirement is 2 years experience in the job of cook, and the alien has no experience as a full-time cook. In *The Winner's Circle*, the primary requirement is 2 years experience in the job of Italian Specialty Cook, and the alien has no experience as a full time Specialty Cook."(pp. 5)

We believe the better course is remand. If the CO determines the job opportunity is full-time, then she is instructed to determine whether the cases cited are applicable to this case, and if so, to allow Employer the opportunity to readvertise or rebut.

ORDER

The Certifying Officer's denial of labor certification is vacated and this matter REMANDED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge